

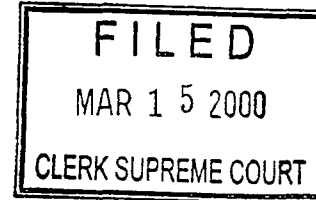
IN THE COURT OF APPEALS OF IOWA

No. 0-047 / 99-0759
Filed March 15, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MILTON FRANK AUSTIN,
Defendant-Appellant.



Appeal from the Iowa District Court for Lee (South) County, D.B.
Hendrickson, Judge.

Milton Austin appeals from the sentences received following his guilty pleas to possession of marijuana in violation of Iowa Code section 124.401(5) (1997), assault with intent to commit sexual abuse in violation of section 709.11, and sexual exploitation by a counselor in violation of section 709.15.

AFFIRMED.

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P.,
Des Moines, for appellant.

Thomas J. Miller, Attorney General, Chris Odell, Assistant Attorney
General, and Michael P. Short, County Attorney, for appellee.

Heard by Sackett, C.J., and Hecht and Vaitheswaran, JJ. Miller, J., takes
no part.

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HECHT, J.

Milton Austin ("Austin") appeals from the sentences received following his guilty pleas to possession of marijuana in violation of Iowa Code section 124.401(5) (1997), assault with intent to commit sexual abuse in violation of section 709.11, and sexual exploitation by a counselor in violation of section 709.15. We affirm.

I. Factual Background and Proceedings. At all times relevant to these proceedings, Austin was a licensed physician practicing in Keokuk, Iowa. Over the course of several months, a number of female patients indicated he approached them in a sexual manner and made unwelcome sexual advances towards them. All expert consulting physicians concur Austin suffers from bipolar disorder with alternating episodes of depression and hypomanic behaviors and narcissistic personality disorder. Austin contends he was in a manic state at the time of the offenses. He is currently receiving treatment for those disorders.

Based on the information given by his female patients, the State filed amended trial information charging Austin with the following: (1) Count I – sexual exploitation by a counselor; (2) Count II – delivery of marijuana; (3) Count III – possession with intent to deliver marijuana; (4) Count IV – assault with intent to commit sexual abuse; (5) Count V – sexual exploitation by a counselor; and (6) Count VI – sexual exploitation by a counselor. On February 15, 1999, Austin pled guilty to one count of sexual exploitation by a counselor, one count of assault with intent to commit sexual abuse and one count of possession of

marijuana. As part of the plea agreement, the State agreed not to resist deferred judgments on the sexual exploitation count and the assault count.

The district court ordered a presentence investigation (PSI). Defense counsel received notice of the original PSI in a timely manner. The original PSI contained victim impact statements from three victims and a list of the six victims known at the time. An addendum to the PSI was filed on April 7, 1999. The addendum consisted of four additional victim impact statements.

The district court held the sentencing hearing on April 9, 1999, and sentenced Austin to two years imprisonment for the assault charge and three months imprisonment for the possession charge. Austin received a deferred judgment on the sexual exploitation charge in accordance with the plea agreement. Defense counsel received the PSI addendum on April 12, 1999, three days after the sentencing. Austin filed a motion for correction of sentence and rehearing. The district court denied the motion.

Austin appeals contending: (1) the failure to serve defense counsel with timely notice of the PSI addendum requires the case to be remanded for resentencing; (2) the district court abused its discretion by sentencing him to imprisonment; (3) the district court impermissibly relied on unprosecuted offenses when sentencing him; and (4) the State breached the terms of the plea agreement.

II. Standard of Review. We review the district court's sentence for the correction of errors at law. Iowa R. App. P. 4; *State v. Phillips*, 561 N.W.2d 355, 357 (Iowa 1997). "A sentence will not be upset on appellate review unless the

defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors.” *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995) (quoting *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983)). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Sailer*, 587 N.W.2d 756, 759 (Iowa 1998).

III. Notice of PSI Addendum. Austin contends the failure to provide defense counsel with notice of the PSI addendum in a timely manner requires this court to remand for resentencing. Section 901.4 provides, in relevant part, [a]t least three days prior to the date set for sentencing, the court shall serve all of the presentence investigation report upon the defendant’s attorney.” Iowa Code § 901.4. Failure to comply with this section renders the evidence contained in the addendum inadmissible on the issue of sentencing. *State v. Dake*, 545 N.W.2d 895, 897 (Iowa App. 1996). In the present case, the addendum was not filed with the district court until two days before sentencing and defense counsel did not receive notice until three days after sentencing. Therefore, the information contained in the addendum was inadmissible at the sentencing hearing.

However, Austin must still show the district court impermissibly considered the information contained in the addendum. See *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990). To overcome the presumption the district court properly

exercised its discretion, Austin must make an affirmative showing the judge relied on the improper evidence when making the sentencing determination. See *Dake*, 545 N.W.2d at 897 (citing *Ashley*, 462 N.W.2d at 282).

In its order denying Austin's motion for correction of sentence, the district court noted the addendum consisted of additional victim impact statements and stated "while the statements may have been in the file, the Court did not review them or consider them before sentencing." Austin has failed to affirmatively show otherwise.

IV. Sentence. Austin next contends the district court abused its discretion in sentencing him to imprisonment by considering only the nature of his offenses to the exclusion of other factors. He also contends the district court impermissibly relied on the two unprosecuted counts of sexual exploitation.

A. Sentencing Factors. Upon sentencing, the district court should consider all pertinent matters in determining the proper sentence. *State v. Cooley*, 587 N.W.2d 752, 755-56 (Iowa 1998). When considering whether to enter a deferred judgment, the district court:

first shall determine which [sentencing] option, if available, will provide maximum opportunity for the rehabilitation of the defendant and protection of the community from further offenses by the defendant and others. In making this determination the court shall consider the age of the defendant; the defendant's prior record of convictions and prior record of deferments of judgment if any; the defendant's employment circumstances; the defendant's family circumstances; the nature of the offense committed; and such other factors as are appropriate.

Iowa Code § 907.5. At the sentencing hearing in this case, the district court stated its reasons for choosing the sentencing imposed upon Austin:

I have reviewed the presentence investigation . . . , I've taken into consideration the plea agreement in this matter, I've taken into consideration the reports of the psychiatrists, the statements of the victims, the statements made in court today by both sides, and I find that the following is the appropriate disposition of the charges against Mr. Austin, Doctor Austin.

This disposition takes into account Doctor Austin's medical problems, the harm to the community and in particular to the victims, and the potential to rehabilitate the defendant.

Austin contends the district court abused its discretion by considering only the nature of his offenses when sentencing him and should have granted deferred judgments on the assault and possession charges. He claims he is a good candidate for a deferred judgment because of his age, family support, high level of education, and ongoing rehabilitative efforts. We note Austin received a deferred judgment on the sexual exploitation charge. This indicates the district court was aware of, and did exercise its discretion to give Austin a deferred judgment. Although the district court did consider the nature of the offenses Austin committed, the record reflects it also based the sentencing decision on other appropriate factors, including those urged by Austin as reasons he should have been granted deferred judgments on all three counts. The grounds stated by the district court for sentencing Austin to imprisonment are not clearly untenable or unreasonable. We therefore find no abuse of discretion by the district court by sentencing Austin to imprisonment on the assault and possession charges.

B. Unprosecuted Offenses. Austin next contends the district court erred by considering the two unprosecuted counts of sexual exploitation. We will set aside a sentence and remand a case if the sentencing court relied upon charges

of an unprosecuted offense that was neither admitted to by the defendant nor otherwise proved. *Sailer*, 587 N.W.2d at 762. This rule prohibits the sentencing court from relying on “additional, unproven, and unprosecuted charges” when no facts before the court show the charges are valid. *State v. Messer*, 306 N.W.2d 731, 732-33 (Iowa 1981). The district court’s sentencing decision is cloaked with a strong presumption in its favor, and a sentence will not be disturbed absent some showing by the defendant that the sentencing court actually considered unproven or unprosecuted offenses. *State v. Witham*, 583 N.W.2d 677, 678 n1 (Iowa 1998) (citing *State v. Stanley*, 344 N.W.2d 564, 568 (Iowa App. 1983)).

Specifically, Austin points to statements made by the prosecutor during the sentencing hearing to support his allegation the district court relied on unprosecuted offenses. After noting many of Austin’s positive attributes, the prosecutor stated:

On the negative side, I see multiple victims and I see their sense of betrayal, their sense of loss. These are victims who primarily were weak and vulnerable. They had put Doctor Austin in a position of trust and power and, as a result, have a sense of violation. One of them terms it as being degraded, humiliated, and violated.

From the presentence investigations, you see reactions that are equivalent to a witness who has been through a rape. This is a very serious crime and he’s – the defendant’s conduct has caused serious damage to multiple people.

Austin argues the prosecutor’s use of the word “multiple” in his statement at sentencing proves the court relied on all three of the original sexual exploitation charges. We disagree. Austin pled guilty to both sexual exploitation and assault. These crimes were based on incidents with more than one victim. Because

Austin pled to crimes committed against multiple victims, the State could properly discuss those victims. In addition, defense counsel mentioned multiple victims and the resulting civil lawsuits brought by those victims in his statement to the court. Finally, Austin points to no evidence that the judge considered the statements by the prosecutor. We have great confidence in district court judges to only sentence defendants to the charges actually proven or admitted and will not assume a judge failed to do so without clear evidence to the contrary. See *Sailer*, 587 N.W.2d at 764. Austin failed to demonstrate such evidence in the record in this case. We therefore conclude the district court did not abuse its discretion by sentencing Austin to imprisonment.

V. Breach of Plea Agreement. In the plea agreement, the State promised not to resist deferred judgments on the sexual exploitation and assault charges. Austin contends the State breached the plea agreement in two respects. First, he argues the State urged the court to require the defendant to register as a sex offender. Whether a defendant must register as a sex offender is not within the court's discretion. Section 692A.1(1) requires someone "who has received a deferred sentence or a deferred judgment" on a charge involving sexual exploitation or sexual violence to register as a sex offender. Iowa Code § 692A.1(1). Whether the district court gave Austin a deferred judgment or sentenced him to prison, the court had no discretion in whether registration would be required. The district court is not involved in placing a defendant on the registry. The statute places the duty to register on the offender. Therefore,

with respect to registration as a sexual offender and we find no reversible error on this issue.

Secondly, Austin contends the State breached the plea agreement. Despite its promise not to resist a deferred judgment, the State reminded the sentencing court “the Department of Corrections recommends incarceration in this case.” We do not consider this issue, however, because Austin asserts it for the first time in his reply brief. See *State v. Leutfaimany*, 585 N.W.2d 200, 207 (Iowa 1998); see also *Sun Valley Iowa Lake Ass’n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996). Accordingly, we affirm Austin’s convictions.

AFFIRMED.